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**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

IN RE GENERAL MILLS, INC. KIX
CEREAL LITIGATION

**Case No. 2:12-cv-00249-KM-
JBC**

Return Date: November 2, 2015

**ORAL ARGUMENT
REQUESTED**

**PLAINTIFFS' STATEMENT OF MATERIAL FACTS NOT IN DISPUTE
IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY
JUDGMENT**

Pursuant to Local Civil Rule 56.1, Plaintiffs Christina Bevans, Robin Marcus, Christine Zardeneta, and Daniel Kellogg (collectively “Plaintiffs”), rely on the following statement of undisputed facts in support of their Motion for Partial Summary Judgment.

Background

1. Defendant General Mills, Inc. (“General Mills”) makes and markets Original Kix, Berry Berry Kix, and Honey Kix cereals (collectively, “Kix”). (General Mills, Inc.’s Answer to Class Action Complaint in *Bevans v. General Mills, Inc.*, ECF No. 105 (“Bevans Answer”) ¶ 2; General Mills, Inc.’s Answer to Class Action Complaint in *Marcus v. General Mills, Inc.*, ECF No. 107 (“Marcus Answer”) ¶ 14; General Mills, Inc.’s Answer to Second Amended Class Action Complaint in *Zardeneta v. General Mills, Inc.*, ECF No. 109 (“Zardeneta Answer”) ¶ 3; General Mills, Inc.’s Answer to Class Action Complaint, *Kellogg v. General Mills, Inc.*, No. 2:14-cv-05565-KM-SCM (D.N.J. Oct. 16, 2014), ECF No. 38 (“Kellogg Answer”) ¶ 14.)

2. Starting in 2009, General Mills began to claim on the front of boxes of Original Kix that it was “Made with All Natural Corn.” (Keenan Decl., Ex. 1 (Defendant General Mills, Inc.’s Responses and Objections to Plaintiffs’ First Set of Requests for Admission (Amended) (“1st RFA

Resp.”) No. 4 at 14-19); Keenan Decl., Ex. 3 (Deposition of Claudia Klug (Aug. 19, 2014)) at 30:18-31:1.)

3. In 2010, General Mills introduced Berry Berry Kix and Honey Kix and similarly began to claim that they were “Made with All Natural Corn.” (1st RFA Resp. Nos. 5-6 at 19-26.)

4. General Mills removed the “Made with All Natural Corn” claim from Kix packaging in 2013. (Keenan Decl., Ex. 5 (Declaration of Carla Vernon (Sept. 11, 2014)) ¶ 2 at 2; Keenan Decl., Ex. 6 (Declaration of Brad Hiranaga (Sept. 11, 2014)) ¶ 3 at 2.)

Kix is Made with GE Corn

5. Corn is the primary ingredient in Kix. (Keenan Decl., Ex. 7 (GMI_KIX00000150; GMI_KIX00000186; GMI_KIX00000191).)

6. Kix is made with GE corn.¹ (Keenan Decl., Ex. 2 (Defendant General Mills, Inc.’s Responses and Objections to Plaintiffs’ Second Set of Requests for Admission) (“2d RFA Resp.”) Nos. 1-3 at 4-6; Keenan Decl., Ex. 4 (Deposition of Carla Vernon (Nov. 14, 2014)) at 83:21-23; Keenan Decl., Ex. 8 (Deposition of Sarah Geisert (May 21, 2013)) at 43:18-44:1 &

¹ For purposes of this statement, genetically engineered (“GE”) corn refers to corn produced through a process in which recombinant DNA or gene-splicing techniques are used to isolate a gene or genes in one organism and then insert that gene (or genes) into another organism.

48:16-49:9; Expert Declaration of Charles M. Benbrook, Ph.D., dated June 19, 2015 (“Benbrook Decl.”) ¶ 9(a).)

7. The GE corn that was used to make Kix was genetically engineered to tolerate herbicides and resist insects. (Benbrook Decl. ¶¶ 9(b) & (c).)

8. As of 2013, GE corn accounted for 90% of the corn acreage planted in the United States. (Keenan Decl., Ex. 9 (Nat’l Agric. Statistics Serv., U.S. Dep’t of Agric., Acreage (2013)) (“2013 USDA Acreage Data”) at 25.)

9. As of 2013, herbicide-tolerant GE corn accounted for 85% of the corn acreage planted in the United States. (2013 USDA Acreage Data at 25; 2d RFAs No. 10 at 14.)

10. As of 2013, insect-resistant GE corn accounted for 76% of the corn acreage planted in the United States. (2013 USDA Acreage Data at 25; 2d RFAs Nos. 11-12 at 15.)

11. As of 2013, GE corn that was both herbicide-tolerant and insect-resistant accounted for 71% of the corn acreage planted in the United States. (2013 USDA Acreage Data at 25.)

12. In 2011, American farmers planted 92.28 million acres of corn. (Keenan Decl., Ex. 10 (Nat'l Agric. Statistics Serv., U.S. Dep't of Agric., Acreage (2011) ("2011 USDA Acreage Data"))) at 6.)

13. The Monsanto Company ("Monsanto") reported that in 2011, American farmers planted 79 million acres of corn seed with genetically engineered traits that Monsanto had developed. (Keenan Decl., Ex. 13 (Monsanto, Monsanto Supp. Information for Investors (Jan. 5, 2012) ("Monsanto Investor Data"))) at 3.)

14. In 2009, American farmers planted 86.48 million acres of corn. (Keenan Decl., Ex. 11 (Nat'l Agric. Statistics Serv., U.S. Dep't of Agric., Acreage (2010) ("2010 USDA Acreage Data"))) at 5.)

15. In 2009, Monsanto reported that American farmers planted 70.6 million acres of corn seed with genetically engineered traits that Monsanto had developed. (Monsanto Investor Data at 3; *see also* Keenan Decl., Ex. 12 (Monsanto, Monsanto Biotechnology Trait Acreage: Fiscal Years 1996-2009 (Oct. 7, 2009) ("Monsanto 2009 Data"))).)

16. Of the 70.6 million acres of GE corn seed planted in 2009 with traits that Monsanto had developed, 69.8 million acres were genetically engineered to tolerate herbicides. (Monsanto 2009 Data.)

GE Corn is Not Natural

17. Monsanto has described GE seeds as having had “their genetic makeup altered to exhibit traits that are not naturally theirs.” (Bevans Answer ¶ 5; Zardeneta Answer ¶ 21; Kellogg Answer ¶ 9; Marcus Answer ¶ 9.)

18. The World Health Organization has described GE seeds as those which have had their genetic material “altered in a way that does not occur naturally.” (Bevans Answer ¶ 26; Zardeneta Answer ¶ 23; Kellogg Answer ¶ 17; Marcus ¶ 9.)

19. Romer Labs, a company that works with the agricultural industry, has stated that scientists genetically engineer plants so that the resulting GE crop can “express novel traits that normally would not appear in nature.” (Bevans Answer ¶ 27; Zardeneta Answer ¶ 22.)

20. Most GE corn grown in the United States is genetically engineered to tolerate herbicides and/or resist insects. (2013 USDA Acreage Data at 25; Benbrook Decl. ¶ 29.)

21. GE corn cannot be created without the use or manipulation of bacterial or viral DNA. (Benbrook Decl. ¶¶ 29, 47, 58-61, 67, 73, 79-81 & 96.)

22. GE corn contains sequences of DNA called promoters that control when a gene is turned on (*i.e.*, expressed) and at what level. (*Id.* ¶¶ 46(j) & (l), 67-70 & 73.)

23. The promoters used in GE corn originate from bacteria, viruses, or species other than corn. (*Id.* ¶¶ 66, 112-113, 120 n.8, 135, 143-44.)

24. GE corn contains sequences of DNA called terminators that control when a gene is turned off (*i.e.*, no longer expressed). (*Id.* ¶¶ 46(j) & (l), 71 & 73.)

25. The terminators used in GE corn originate from bacteria, viruses, or species other than corn. (*Id.* ¶¶ 112 n.7, 120 n.8, 135 & 143-44.)

26. GE corn is created through the use of a transgene or gene cassette containing sequences of manipulated genetic material. (*Id.* ¶¶ 9(d), 46(l) & 65-90.)

27. There is no natural way to transfer a transgene containing ordered sequences of manipulated genetic material from different organisms into a target plant's genome. (*Id.* ¶ 76.)

28. A transgene is transferred into a target plant's genome through the use of a bacterium or a gene gun. (*Id.* ¶¶ 75-87.)

Roundup Ready 2 Corn is Not Natural

29. Herbicide-tolerant GE corn has been genetically engineered to withstand the application of a specific family of herbicides that would otherwise kill or severely damage the plant. (*Id.* ¶ 46(h).)

30. Most GE corn planted in the United States between 2009 and 2013 was genetically engineered to tolerate herbicides. (*Id.* ¶ 29; 2013 USDA Acreage Data; 2011 USDA Acreage Data; 2010 USDA Acreage Data; Monsanto Investor Data at 3; Monsanto 2009 Data.)

31. The most common versions of herbicide-tolerant corn are so-called “Roundup Ready” varieties, sold or licensed by Monsanto, that have been engineered to tolerate the application of the herbicide glyphosate, which Monsanto sells under the brand name Roundup. (Benbrook Decl. ¶¶ 98 & 132.)

32. Roundup Ready 2 corn contains the sequence for the CP4-EPSPS gene. (*Id.* ¶¶ 133-34 & 141-49.)

33. The CP4-EPSPS gene is a modified version of a gene extracted from a bacterium. (*Id.* ¶ 134.)

34. The CP4-EPSPS gene causes Roundup Ready 2 corn to produce a modified version of the EPSPS enzyme, which makes the corn able to tolerate the herbicide glyphosate. (*Id.* ¶¶ 142-49.)

35. Roundup Ready 2 corn contains DNA from the Cauliflower Mosaic Virus. (*Id.* ¶ 135.)
36. The Cauliflower Mosaic Virus DNA used in Roundup Ready 2 corn is modified to work as a promoter for the CP4-EPSPS gene. (*Id.* ¶¶ 135 & 144.)
37. Roundup Ready 2 corn contains DNA (NOS 3') extracted from the bacterium *Agrobacterium tumefaciens*. (*Id.* ¶ 135.)
38. The NOS 3' DNA used in Roundup Ready 2 corn is modified to work as a terminator for the CP4-EPSPS gene. (*Id.* ¶¶ 135 & 143-44.)

Bt Corn is Not Natural

39. Insect-resistant GE corn has been genetically engineered to express one or more endotoxins that are toxic to certain insects. (*Id.* ¶ 46(i).)
40. Most GE corn planted in the United States between 2009 and 2013 was genetically engineered to produce one or more *Bt* endotoxins. (*Id.* ¶ 29; 2013 USDA Acreage Data; 2011 USDA Acreage Data; 2010 USDA Acreage Data; Monsanto Investor Data at 3; Monsanto 2009 Data.)
41. The most common versions of YieldGard corn are engineered to produce modified versions of either the Cry1Ab endotoxin or the Cry3Bb1 endotoxin, or both. (Benbrook Decl. ¶ 98.)

42. YieldGard corn with *Bt* protection against the Corn Borer (“YieldGard Corn Borer”) contains a modified version of a gene extracted from the soil bacterium *Bt* that causes the corn plant to produce a modified version of the endotoxin Cry1Ab. (*Id.* ¶¶ 111-17.)

43. YieldGard Corn Borer corn contains DNA from the Cauliflower Mosaic Virus. (*Id.* ¶¶ 112-13.)

44. The Cauliflower Mosaic Virus DNA used in YieldGard Corn Borer corn is modified to work as a promoter for the gene that produces the Cry1Ab endotoxin. (*Id.*)

45. YieldGard Corn Borer corn contains DNA (NOS 3’) extracted from the bacterium *Agrobacterium tumefaciens*. (*Id.* ¶ 112 n.7.)

46. The NOS 3’ DNA used in YieldGard Corn Borer corn is modified to work as a terminator for the gene that produces the Cry1Ab endotoxin. (*Id.*)

47. YieldGard corn with *Bt* protection against the Rootworm (“YieldGard Rootworm”) contains a modified version of a gene extracted from the soil bacterium *Bt* that causes the corn plant to produce a modified version of the endotoxin Cry3Bb. (*Id.* ¶¶ 120 n.8 & 121.)

48. YieldGard Rootworm corn contains DNA from both wheat and the Cauliflower Mosaic Virus. (*Id.* ¶ 121.)

49. The DNA from wheat and the Cauliflower Mosaic Virus used in YieldGard Rootworm corn is modified to work as promoters for the gene that produces the Cry3Bb endotoxin. (*Id.* ¶¶ 121-23.)

50. YieldGard Rootworm corn contains DNA (NOS 3') extracted from the bacterium *Agrobacterium tumefaciens*. (*Id.* ¶ 120.)

51. The NOS 3' DNA used in YieldGard Rootworm corn is modified to work as a terminator for the gene that produces the Cry3Bb endotoxin. (*Id.*)

**Patents Covering the Genetically Engineered Corn Used in Kix
Establish that the Corn is Artificial and Synthetic**

52. Roundup Ready corn is protected by, among others, U.S. Patent No. 6,040,497. (Keenan Decl., Ex. 14 (Monsanto, Product Patents, <http://www.monsanto.com/products/pages/product-patents.aspx> (last visited Mar. 19, 2014).))

53. Roundup Ready 2 corn is protected by, among others, U.S. Patent Nos. 6,825,400 and RE39247. (*Id.*)

54. YieldGard Corn Borer corn is protected by, among others, U.S. Patent No. 6,180,774. (*Id.*)

55. YieldGard Corn Borer with Roundup Ready 2 corn is protected by, among others, U.S. Patent Nos. 6,180,774, 6,825,400, and RE39247. (*Id.*)

56. YieldGard Rootworm corn is protected by, among others, U.S. Patent Nos. 6,063,597 and 6,501,009. (*Id.*)

57. YieldGard Rootworm with Roundup Ready 2 corn is protected by, among others, U.S. Patent Nos. 6,063,597, 6,501,009, 6,825,400, and RE39247. (*Id.*)

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